U.S. Department of Labor

Office of Administrative Law Judges
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Date: September 7, 2000

Case No.: 1999-LHC-2354

OWCP No.: 08-111624

In the Matter of:

PEDRO HINOJOSA,
Claimant

against

SCHAEFFER STEVEDORING,
Employer

and

SIGNAL MUTUAL INDEMNITY ASSOCIATION, LTD.,
Carrier

APPEARANCES:

Phil Watkins
On behalf of the Claimant

David Ayers
On behalf of Employer

BEFORE: RICHARD D. MILLS
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Worker's Compensation Act

(hereinafter "the Act"), 33 U.S.C. § 901, et seq., brought by Pedro Hinojosa ("Claimant") against Schaeffer Stevedoring ("Employer") for injuries allegedly sustained during the unloading of a vessel.

The issues raised here could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held February 3, 2000 in Harlingen, Texas. All parties were afforded a full opportunity to adduce testimony, offer evidence, and submit post-hearing briefs. Post-hearing briefs were received from Claimant and Employer. Based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

STIPULATIONS

Prior to the hearing, the parties agreed to a joint stipulation (JX-1):[1]

1. That jurisdiction under the act is not contested;

2. That the date of the injury/accident was June 6, 1996;

3. That the injury arose within the course and scope of employment;

4. That an Employer-Employee relationship existed at the time of the injury;

5. That the Employer was timely notified of the accident under Section 12 and 13 of the Act as of June 6, 1996;

6. That the Notice of Controversion (LS-207) was filed on March 6, 1997;

7. That an informal conference was held on December 17, 1997;

8. That claimant's average weekly wage at the time of the injury was $136.44, and the claimant's compensation rate was $136.44.

ISSUES

[1] The following references will be used: TX for the official hearing transcript; JX-__ for Joint exhibits; CX-__ for the Claimant's exhibits; and EX-__ for Employer's exhibits.

The parties listed the following issues as disputed on the joint stipulation:

1. The date the claimant reached maximum medical improvement;

2. The claimant's period of temporary total disability;

3. Whether the claimant is permanently totally disabled.

The parties also listed the following specific issues as unresolved:

1. The Nature and Extent of Disability (Temporary and Permanent)

2. The date of maximum medical improvement

3. Claimant's entitlement to interest on compensation not paid within 14 days of the date due

4. Attorney's fees in addition to compensation under Section 28.

SUMMARY OF FACTS

I. GENERAL INFORMATION

At the time of the hearing, Claimant was 44 years of age. (EX-13, p. 5). He attended school through the ninth grade, but was frequently absent because he worked with his family as a migrant farm laborer. (TX, pp. 16-17). He does not have a G.E.D. or any additional formal training and he cannot read and write in Spanish or in English. (EX-13, p. 6). Before the accident he had worked as a longshoreman for 17 years. He had also worked at a door factory in Dallas, Texas and a cotton gin. (EX-13, pp.7-8).

Claimant had no prior history of back pain when he presented to Dr. Kuri for treatment in June of 1996. (CX-3, p. 6). He did not report having suffered other work related injuries, and there is no dispute among the physicians that his past medical history is non-contributory. (*Compare*, CX-4, p.24; EX-25, p.2; CX-4, p.3). Claimant admitted one prior work related injury that happened 17 years prior to this accident. At that time, a set of pipes he was working with at the Port rolled onto his big toes. (EX-13, p. 17).

Claimant spent at least two years in prison following a 1980 conviction for attempted murder. (EX-23). He was also previously convicted of Driving While Intoxicated on two separate occasions and was once arrested for domestic violence. (EX-23).

The claimant was employed by Schaefer Stevedoring Company (Employer) on board the M/V CLIPPER GOLDEN HIND at Cargo Dock 3 in the Port of Brownsville, Texas as a "longshoreman." He sustained his injury on June 6, 1996 while unloading a cargo of steel plates from the No. 3 hatch aboard that vessel. (JX-1).

II. INJURY

Date and Method of Injury

Pedro Hinojosa was injured in the course of unloading a set of metal plates from the M/V CLIPPER GOLDEN HIND. In his hearing testimony, claimant said that he did not know how the accident happened, but that during the course of unloading, the hook they were using to unload the metal plates hit him in the back injuring him. (TX, pp.14-15). There is no dispute that this is how the accident happened, and that Claimant was injured as a result of being hit in the back by the hook. The parties have stipulated that the injury/accident happened on June 6, 1996. (JX-1).

Notice

The parties have also stipulated that Claimant gave his employer appropriate and timely notice of his injury under the act. Notice was given on June 6, 1996. (JX-1). The parties also agree that the Notice of Controversion was timely given on March 6, 1997. (JX-1).

Medical Treatment

On June 14, 1996, Claimant saw Dr. Jose Kuri, a Neurological Surgeon in Brownsville Texas. Claimant complained of pain in his lower back radiating to his legs. (CX-3, p. 6). Dr. Kuri diagnosed Claimant with an acute back sprain and referred him for x-rays of the lumbosacral spine. (CX-4, p. 3). These images indicated changes of the claimant's degenerative disc disease and caused Dr. Kuri to order an MRI of the lumbosacral spine. The MRI showed degeneration of the L-4 and L-5 discs. (CX-4, p. 12). Dr. Kuri treated Claimant's condition with a combination of medicine and physical therapy. (CX-4, p. 12).

On August 1, 1996, after Claimant reported suffering from increased pain, Dr. Kuri ordered a myelogram and a CT scan. (CX-4, p. 17). Kuri did not believe that the results of these tests indicated that the patient needed surgery. He continued to treat Claimant's injury conservatively and referred him for a second opinion to Dr. Pisharodi. (CX-4, p.23).

Claimant saw Dr. Pisharodi on September 3, 1996. Pisharodi reviewed the previous tests that had

been ordered by Dr. Kuri, and advised the claimant to have an MRI of the lumbar spine as well as electrodiagnostic tests for the lower extremities. (CX-4, pp. 24-25). Several months later, Dr. Pisharodi advised the claimant to have a discogram, and, after one failed attempt, the claimant had the procedure performed on February 10, 1997. (CX-4, pp. 36-37). The results of the discogram indicated that the claimant suffered from unstable degenerative disc disease. Dr. Kuri recommended that the claimant have surgery including interbody fusion and spinal instrumentation to correct this problem. He referred claimant back to Dr. Pisharodi for further evaluation and treatment. (CX-4, p45).

Following reevaluation, Dr. Pisharodi concurred with Dr. Kuri's evaluation and advised that the claimant have a two level diskectomy and fusion to remedy his injury. (CX-4, p. 48). The claimant hesitated to have the surgery because he is afraid that he will be paralyzed and confined to a wheel chair as a result of the procedure. (TX, p. 19). At the hearing, the claimant indicated that the doctors had given him a 50-50 chance of success if he had the surgery. He said that he was afraid of the possibility and that he would only have the surgery if it was absolutely necessary. (TX, pp. 19-20).

Some confusion exists regarding the date at which the claimant reached maximum medical improvement. Dr. Kuri originally indicated that this occurred as of January 20, 1997, but then changed his opinion in February. This confusion as to the facts will be covered in detail below.

The claimant also submitted to an independent medical examination by Dr. S. Gopal Krishnan, an orthopedist in Weslaco, Texas. It is Dr. Krishnan's opinion that the claimant does not require surgery. He suggests that this is an inappropriate remedy for Hinojosa's injury and that it would in fact make the problem worse. (EX-25, p.5). Dr. Krishnan examined the claimant on February 17, 2000 and found that the claimant had reached maximum medical improvement by that date. (EX-25). Krishnan's final impression was that the claimant suffered from a contusion of the lumbar spine and disc degeneration at the L4-5 and L5 and S1. He also felt that the claimant had symptom magnification. (EX-25, p. 5).

The claimant elected not to have surgery for his condition. He was treated medically for the problems he was having with a combination of Naprosyn[2] and Zostril[3], both of which were prescribed by Dr. Kuri[4]. (CX-3, p. 9). In addition, he uses a cane to aid him in walking. The Claimant testified that the

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[2]Dr. Kuri testified in his deposition that Naprosyn is a medication used to reduce moderate to severe pain.

[3]Dr. Kuri's deposition testimony identified Zostril as an ointment used in conjunction with Naprosyn for the reduction of the claimant's back pain.

[4]Dr. Kuri's medical records note that the patient was originally given a prescription for Darvocet. Darvocet is a narcotic analgesic which may also produce psychic and physical dependency. (Physician's Desk Reference ("PDR"), 52 Ed., 1998).

cane was prescribed by Dr. Pisharodi. (TX, p. 20). There is no indication of such a prescription in Dr. Pisharodi's records, however. At best, Pisharodi says that the claimant asked for a cane to aid in his mobility. (CX-4, p. 48).

Based on his medical difficulties, the claimant's doctors restricted the duties he could perform on returning to work. Much of the dispute in this case revolves around what specific tasks the claimant can and cannot perform. Accordingly, the factual basis for the dispute will be discussed in detail below.

Dr. Krishnan, the employer's independent medical examiner, said that the claimant was capable of working at medium work. Krishnan asserts that claimant can work up to 8 hours a day at medium duty employment. (EX-26, p. 3). Krishnan was also given a list of proposed alternate employment by Employer's counsel. He was asked to indicate which jobs would be acceptable for the Claimant given his physical limitations. Dr. Krishnan indicated that the claimant was capable of working as an electric tool repairer, an audio/visual repairman, a groundskeeper, a laundry dry clean presser, a repairman for chainsaws, a fast food worker, a rag cutter, and a cafeteria worker/server. (EX-26, pp.2-3). Even taken at its best, Krishnan's testimony does not indicate that the plaintiff is capable of returning to longshore work.

Dr. Kuri, in contrast, would more drastically restrict the Claimant's work functions. Kuri says that a return to longshore work is out of the question in this case because Hinojosa would be required to lift more than he is capable of and because he could not change positions as needed or stand for the required amount of time. (CX-3, p. 17). Kuri also said in his deposition that the claimant could not sit for extended periods of time, could not use his feet to operate machinery, could not do high speed work, and could not work more than 1 or 2 hours per day. (CX-3, pp. 15-16).

Vocational Rehabilitation

Claimant worked with two vocational rehabilitation counselors following his accident. The first was Mr. Flores, a vocational rehabilitation counselor assigned by the U.S. Department of Labor and nominally Employer's expert in this case. The other was Calvin Turner, claimant's expert, and a vocational rehabilitation consultant.[5] The two experts disagree fundamentally over what type and amount of work claimant is capable of performing.

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[5]Calvin Turner's Vocational Rehabilitation Evaluation of Mr. Hinojosa was presented to the court as CX-5. At the hearing, the court took the employer's objection to this report under advisement, reserving ruling until the issuance of this order. The substance of employer's objection is that Mr. Turner's report includes medical conclusions about the claimant's mental state that Turner is unqualified to make. This is an objection to two minor statements in a 7 page report. The court considers that, based on his experience in the field, Mr. Turner is capable of saying whether or not a claimant appears depressed. Moreover, the court thinks that these two statements are unimportant to the overall conclusions of the report. Employer's objection to CX-5 is therefore overruled.

Mr. Flores sent the claimant for a series of vocational tests.[6] The results of those tests indicated that the claimant had a 3rd grade education with respect to reading, writing, and spelling. Claimant, however, does have certain transferable job skills including the use of hand tools and machines needed for work, measuring and cutting with accuracy, using his eyes, hands, and fingers to operate or adjust equipment, operating vehicles and machinery, understanding and following simple instructions, detecting small differences in size shape, and texture, and paying attention to safety rules when working around machinery. (EX-19, p.6). On the basis of these vocational tests, Flores selected 10 types of jobs for which he thought the claimant was qualified. He then performed a labor market review to determine the availability of these jobs in the local area.

The labor market review found more than 30 jobs for which Flores asserts that the Claimant is qualified. (EX-24). The review does not provide specific details about what is required in each position. Claimant has, at various times, asserted both that he went to apply for the jobs proposed by Mr. Flores and that he never went to look for other employment after his accident. There is no independent documentation in the record to suggest which of the Claimant's accounts is accurate.

Calvin Turner, claimant's expert, met with the claimant only briefly[7]. During their meeting, Turner administered a battery of vocational ability tests to the claimant. On the basis of these tests, Turner opined that the Claimant had a legitimate employment handicap. Turner bases his opinion on the facts that the Claimant has a limited education, few transferable vocational skills, and a host of physical difficulties. His report provides reasons why each of the alternative employment opportunities proposed by the Employer's experts are inappropriate for the Claimant at this time. He does not offer any appropriate forms of employment. (CX-5).

DISCUSSION

I. JURISDICTION

The parties have stipulated that Claimant was an employee of the Respondent on the date of the accident. (JX-1). They have also stipulated that he was employed as a longshoreman in the process of

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[6]Mr. Flores' report of his initial meeting with claimant demonstrates claimants difficulty with the truth yet again. Flores says that claimant told him claimant was an A class longshoreman working 40 plus hours per week when he was injured. (EX-19, p.1). Claimant's testimony at the hearing, however, indicates that he was only on the B Class. (TX., p. 32).

[7]The evidence presented at trial indicates that the Claimant met with Mr. Turner once, at the Harlingen, Texas, airport. The meeting lasted between thirty and forty-five minutes. Turner did not help the claimant look for work and did not suggest particular jobs that were available in the area. He performed a battery of tests. (TX, pp. 29-31).

unloading a specified vessel. (JX-1). Finally, the parties have stipulated that the Claimant was injured in the course and scope of his employment. (JX-1). Accordingly, the Court finds that this case is indisputably within its jurisdiction.

II. CLAIMANT'S PRIMA FACIE CASE

Employment Related Injury

The parties have stipulated that the claimant was injured during the course and scope of his employment. They have further stipulated that there was an employer/employee relationship between the parties at all times material to this action. (JX-1). Based on these stipulations, the court must work from the presumption that that the injury or disabling condition is causally related to the claimant's employment. *See Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), aff'd, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989). Invoking the presumption shifts the burden to the employer to prove, by substantial evidence, that the injury is not work related. *See Kier v. Bethlehem Steel Corp.,* 16 BRBS 128 (1984). In this case, the employer has offered no evidence to suggest that the injury is not work related. Accordingly, the Court finds that the injury was work related and that the claimant is, on face, entitled to benefits under the act.

Credibility of the Claimant

The determination of the credibility of a witness is exclusively within the purview of this Court. Counsel for the Employer in this case urges the Court to consider the veracity of the Claimant. The Court thinks that the Claimant's testimony is critical in this case, and has carefully considered the Claimant's veracity in formulating this decision. Recovery under the Act requires reliable testimony from the claimant with respect to his injuries and their impact on his life. A claimant whose testimony is unreliable should expect no recovery under the Act. *See Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996); *See also, Grizzle v. Ingalls Shipbuilding, Inc.*, 29 BRBS 671 (ALJ) (1995); *Boudreaux v. Milpark Drilling Fluids*, 29 BRBS 249 (ALJ) (1995).

The claimant's testimony in this case is highly suspect. During his deposition, claimant admitted to two DWI convictions. (EX-13, pp. 9-10). One of these happened shortly after the accident that is the basis of this claim. (TX, pp. 37-41) . Claimant asserted, however, that, other than those two incidents he had never been arrested. (EX-13, p. 17). As counsel for the employer more than adequately demonstrated at the hearing of this matter, that assertion is a bald-faced lie. In reality, Claimant was convicted of attempted murder in 1980 and sentenced to a term in prison. Claimant was also arrested on at least one prior occasion for domestic violence. (EX-23).

There are other substantial issues with the Claimant's capacity for truthfulness. Among these, are the claimant's assertion that he had looked for work, specifically the fact that he told Mr. Flores that he had applied for a number of jobs. In his deposition, the claimant indicated that he had not looked for work, that

he did not think he could work, and that he did not plan on looking for work at any time in the future. (EX-13, p. 14). At trial, however, claimant alleged that he had gone to apply for every job that Rick Flores sent him to. (TX., pp. 34-36). Claimant apparently also told Mr. Flores that he had worked forty or more hours per week as a longshoreman prior to this accident. The reality is that he had not worked at all for more than three months prior to the incident. (TX, p. 34; EX-18). Even when claimant was working full time as a longshoreman, it appears that he did not work more than 60 days in any given year. (EX-18).

The final problem with the claimant's veracity involves the extent of his injuries. Dr. Kuri, claimant's treating physician, indicated that he took Mr. Hinojosa's complaints and statements about his medical condition at face value. Kuri said that he was inclined to believe his patients. (CX-3, pp.13-14). Of course, the patient's failure to be truthful with this Court raises concerns as to whether he was truthful with his doctor.

Claimant's difficulties with the truth seriously diminish his credibility in the eyes of this Court. The Court is inclined to deny benefits to the claimant on the basis that he does not present a believable claim that he is disabled. It is quite apparent that the claimant in this case has no desire to return to work.

III. CLAIMANT'S DISABILITY

Two questions are presented to the Court with respect to Claimant's disability. First, on what date did the claimant reach maximum medical improvement. The claimant's status of temporary total disability will end as of that date. Second, is the claimant permanently totally disabled.

Maximum Medical Improvement

There is a substantial dispute among the parties as to the date when Claimant reached maximum medical improvement and therefore was no longer temporarily totally disabled. Claimant asserts that the appropriate date of maximum medical improvement was either January 7, 2000, when Dr. Kuri testified that he had reached MMI at his last visit, or February 18, 1998, when Dr. Kuri completed a Statement of Attending Physician. Claimant's counsel asserts that the February 18, 1998 statement stated for the first time that the claimant would never be able to return to gainful employment ad that this is the final arbiter of maximum medical improvement.

Employer's counsel, in comparison, asserts that the date of maximum medical improvement was January 20, 1997, when Dr. Kuri stated that MMI had been reached and claimant could return to work. Employer contends that because Claimant could then work eight hour days, he had reached MMI.

Claimant urges the court to give special weight to the testimony of the treating physician when determining the date of maximum medical improvement. The cases cited for this purpose either do not require this on face, or are not binding upon this court. The Ninth Circuit decisions have some persuasive merit. *See Amos v. Director, OWCP,* 153 F.3d 1051, 32 BRBS 144 (CRT) (9th Cir. 1998); *Magallanes v. Bowen*, 881 F.2d 747 (9th Cir. 1989). These decisions are either based on the standards applied to social security disability cases, or are social security cases themselves. They do not provide an absolute rule for the determination of disputes under the Act. This Court is inclined to believe that all of the medical evidence should be evaluated and that a determination of which evidence is more credible should be made on a case by case basis. In some cases the testimony of an independent medical examiner may be just as convincing as that of the treating physician.

The present case certainly requires us to give special weight to the findings of Dr. Krishnan. Dr. Kuri testified that he took the Claimant's statements at face value. But because Claimant has rather severe issues with the truth this was an unfortunate decision on the part of his treating physician. Dr. Krishnan demonstrated that he did not take the Claimant at his word. In light of this, the Court believes that Dr. Krishnan's testimony should be given substantial weight in evaluating this claim.

Unfortunately, Dr. Krishnan does not assign a date at which maximum medical improvement was reached. The Court believes that MMI was achieved substantially earlier than the Claimant proposes. The Court also does not believe that MMI was achieved as early as the Employer suggests. Because it is the only evidence available on this question, the Court must rely on the testimony and records of Dr. Kuri with respect to the question of when maximum medical improvement was achieved.

Dr. Kuri's records show that all of the tests had been completed and all of the information necessary to determining a final course of treatment and prognosis for the claimant was available by February 20, 1997. (CX-4, p.45). Dr. Kuri's letter, dated that day, to Dr. Pisharodi, clearly states Kuri's conclusion that the claimant had degenerative disc disease and required a surgical procedure to alleviate his pain.

Employer urges that the court should find the maximum medical improvement was reached almost one month before that date, on January 20, 1997. Employer's sole basis for this is Dr. Kuri's OWCP-5 form, signed that day. On that form, Kuri checked off that the claimant had reached maximum medical improvement. (EX-21). The Court recognizes that as of that date, Dr. Kuri had diagnosed the claimant with a lumbar sprain. He had yet to order many of the diagnostic tests that were critical to his later determination that the claimant would require surgery to alleviate his discomfort. Accordingly, the Court believes that Kuri had a right to change his mind one month later when it became clear through further tests that claimant was in more dire distress than he originally appeared to demonstrate.

The Court also believes that it was Dr. Kuri's prerogative to await the opinion of Dr. Pisharodi, to whom he referred the claimant, before making a final determination as to claimant's status. By April 23, 1997, Dr. Kuri had more than enough information and time to reach an adequate conclusion about

claimant's status. In a letter to the Texas Rehabilitation Commission dated April 23, 1997, Dr. Kuri expressly states that the claimant "is able to sit, stand, move about, lift and carry objects weighing no more than 10 lbs. He can handle objects, hears and speaks well." (EX-14, p. 16).

In his deposition on January 10, 2000, Dr. Kuri stated that "medically he [Hinojosa] has reached the maximum medical improvement. He's the same, like, in the last two or three years." (CX-3, p. 20). Dr. Kuri's statement permits the court to reach two conclusions. First, the claimant has reached maximum medical improvement. Second, he has been in the same condition of maximum medical improvement for at least three years. The only doubt is with respect to the exact date when claimant reached MMI. That doubt could have been resolved by asking Dr. Kuri for an exact date of MMI in his deposition. The problem could also be resolved by asking Dr. Pisharodi for a date when the Claimant reached maximum medical improvement. Neither doctor was asked for this information on the record.

Perhaps the Claimant could reach a higher level of medical improvement through the surgery recommended by Drs. Kuri and Pisharodi. The Claimant has, understandably, declined to have the surgery. The independent medical examination performed by Dr. Krishnan clearly concludes that performing surgery on this claimant would be a mistake. (EX-25, p. 5). The Court concludes that the Claimant has reached medical improvement, the recommendation for surgery notwithstanding. Dr. Kuri's letter dated April 23, 1997 clearly indicates that the Claimant can return to work with the specified restrictions. On the basis of the evidence offered, the Court finds that the Claimant reached maximum medical improvement as of that date.

Permanent Total Disability

The second dispute among the parties is whether or not the claimant is permanently totally disabled. Employer asserts that suitable alternative employment exists and that claimant could earn as much or more than he was earning as a longshoreman. Claimant suggests that the alternatives proposed by the employer are unacceptable and that the claimant is incapable of performing the functions required in those positions.

Employer's Burden of Proof

The employer must demonstrate that specific job opportunities exist which the injured employee could perform considering the claimant's age, education, work experience, and physical restrictions. *Edwards v. Director, OWCP*, 99 F.2d 1374 (9th Cir. 1993); cert. denied, 114 S.Ct. 1539 (1994). The *Edwards* court also stressed the importance of these jobs being regularly available. To determine the availability of these job opportunities, the trier-of-fact may rely on the testimony of vocational counselors that specific job openings exist to establish the existence of suitable jobs. *Turney v. Bethlehem Steel Corp.*, 17 BRBS 232, 236 (1985); *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984); *Bethard v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 691 (1980); *Pilkington v. Sun Shipbuilding & Dry Dock Co.*, 9 BRBS 473, 477-80 (1978). *See also Armand v. American Marine Corp.*, 21 BRBS 305 (1988) (job must be realistically available). The counselors must identify specific available jobs; labor market surveys are not enough. *Campbell v. Lykes Bros. Steamship Co.*, 15 BRBS 380, 384 (1983); *Kimmel v. Sun*

Shipbuilding & Dry Dock Co., 14 BRBS 412 (1981). *See also Williams v. Halter Marine Serv.*, 19 BRBS 248 (1987) (must be specific, not theoretical, jobs).

In this case, the Court is willing to rely on the testimony of the vocational counselors. The Court believes that the evidence the counselors offered here has gone far enough. Mr. Flores identified specifically available positions that are appropriate based on the Claimant's age, education, experience, and physical restrictions.

Medical Considerations

The Court does not doubt that the claimant is capable of working. In fact, given the evidence and considering the Claimant's truthfulness, the Court must adopt the view of Dr. Krishnan with respect to the Claimant's medical restrictions on work. The Court finds that Claimant was untruthful with his treating physician and therefore, Dr. Krishnan's evaluation is more accurate. The evidence, then, supports that the Claimant is capable of working an 8 hour day at medium work. While it is clear that this would not allow the claimant to return to work as a longshoreman, the Court believes that alternate employment is available.

Claimant's back was injured as a result of this accident. Surely this caused him severe pain for some period of time. Despite conflicting medical evidence, the Court thinks that the Claimant could work. Dr. Kuri, the treating physician, taking the Claimant at face value, believes that he is incapable of returning to his former employment as a longshoreman. (CX-3, p. 17). Kuri also restricted the Claimant to work that allowed him to move around at will, did not require high speed performance, did not involve using his feet to operate machinery, and did not require working more than 1 or 2 hours per day. (CX-3, pp. 15-16). Claimant's counsel bases their case on the evaluation of Dr. Kuri and urges the Court that Claimant is incapable of working for more than 1 or 2 hours per day. They also argue that any alternate employment must take into account Claimant's physical restrictions. The Court does not think that this is the case. Rather, for the reasons given previously, we adopt Dr. Krishnan's view that the Claimant is capable of working an 8 hour day at medium work.

Suitable Alternate Employment

The initial burden is on the employer to prove that suitable alternate employment is available for the claimant. That burden is not displaced by the claimant's obligation to show that he has used reasonable diligence to obtain alternate employment. *See Rogers Terminal & Shipping v. OWCP*, 784 F.2d 687 (5th Cir. 1986); *Marignault v. Stevens Shipping*, 22 BRBS 332 (1989). Schaeffer Stevedoring has presented unrefuted evidence that there is alternative employment available. The only question is whether the work is actually suitable given Claimant's age, education, and work experience.

The Court has evaluated the list of proposed alternate occupations for the Claimant under the assumption that he is capable of working 8 hours per day at medium duty work. Further, the Court gives

significant weight to the evaluation of Dr. Krishnan with respect to Claimant's physical capacity to perform specified jobs.

Rick Flores, a Rehabilitation Counselor with South Texas Rehabilitation, Inc. and the Department of Labor evaluated the Claimant following his accident to determine what other types of employment he is capable of. Mr. Flores, who is nominally Employer's expert in this matter, proposed at least 17 different types of jobs for which he felt that the claimant was qualified. According to Flores' expert report submitted by counsel for the Employer prior to trial, the jobs he selected for Claimant were chosen based on the results of vocational tests from McAllen Work Rehab Center. (EX-, p. 1). Mr. Flores does not indicate in his report what medical information he considered in selecting potential occupations for the Claimant.

Subsequent to the recommendations of Mr. Flores regarding the type of work that Claimant might seek, Employer's counsel asked their medical expert Dr. Krishnan which of the proposed jobs he thought the Claimant could perform. Dr. Krishnan returned the list sent to him by Employer's counsel after marking it to indicate what jobs were physically appropriate for the Claimant. (EX-26). Each of the jobs proposed on this list was available in the Claimant's local area at the time that Claimant was working with Mr. Flores. (EX-24). Thus, the Court finds that, based on the evidence, there was alternative employment available which was suitable for the Claimant given his physical restrictions.

The only question is whether Claimant could secure these alternate forms of employment given his age, education, and work experience. We will evaluate each position for these qualities in turn.[8]

The first two positions that Mr. Flores and Dr. Krishnan agree that Claimant could perform are electric tool repairer and audio video repair. Certainly, the Claimant is physically capable of these tasks. Claimant testified at trial, however, that he did not have any experience with electronics, video, or audio repair. (TX, p. 26). Assuming that Claimant is telling the truth, and that experience is necessary for these positions[9], the Court finds that Claimant is physically capable, but unqualified for these openings. Given that finding, the Court considers these positions unavailable to the Claimant.

Employer also proposes that Claimant could work as a chainsaw repairman and the evidence indicates that he is physically capable of this work. Despite the fact that chainsaws are less technically advanced than electronic tools or audio visual equipment, the Court believes that repairing them still requires a certain degree of knowledge or experience. Claimant lacks this type of technical skill as well.

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[8]It is significant that the information provided by Employer with respect to these alternate jobs is somewhat sparse. The Court is not fully aware of what knowledge or skill is required for any of the positions proposed. In light of that fact, the consideration of these positions is based largely on what is generally known about the individual type of position.

[9]Depending on the degree of repair anticipated, The court believes that it can safely assume that some experience is required for this type of highly technical position.

The Court also considers this position unavailable.

Employer's evidence next indicates that Claimant could seek employment as a fast food worker or a cafeteria server. No specific information is given about the fundamental requirements of these jobs. Based on the Court's general awareness of work of this type, however, it is clear that a fast food position requires at least basic math skills. Although Claimant testified that he is capable of basic addition and subtraction (TX, p.16), the Court suspects that more advanced math skills might be required in that line of work. Without evidence to the contrary, the Court must also assume that the Cafeteria worker position might require similar, or perhaps even greater math skills. It is the Court's opinion, therefore, that these jobs are also unavailable to the Claimant.

There are three jobs proposed on behalf of Employer, that the Court thinks Claimant might be capable of. Dr. Krishnan indicated on his list that the Claimant was physically capable of working as a groundskeeper. The Court is inclined to believe that this position is also compatible with the Claimant's educational background and work experience. Mr. Flores' report indicates that the Claimant possesses certain basic skills for use in the workplace, and the Court does not believe that more than these skills are required to perform basic job duties as a groundskeeper. Likewise, the Court supposes that these basic job skills would be sufficient for the Claimant to obtain work as a rag cutter or a laundry and dry cleaning presser.

The market evaluations performed by Rick Flores indicate that positions for groundskeepers, rag cutters, or pressers are regularly available in the Brownsville area. The Court accepts Dr. Krishnan's view that the Claimant is capable of working an 8 hour day at medium duty work. The Court therefor concludes that the suitable alternate employment is available considering the Claimant's physical situation, age, work experience, and training as a whole. In light of this conclusion, the claimant is not permanently totally disabled.

ORDER

1. Claimant was temporarily totally disabled from June 6, 1996 until April 23, 1997, and respondent shall pay compensation for that period based on Claimant's stipulated average weekly wage of $136.44, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. Section 908(b);

2. Respondent shall pay for or reimburse Claimant for all reasonable and necessary medical care and treatment related to his work related injury and any aggravations;

3. Employer shall pay Claimant interest on any accrued unpaid compensation benefits. The rate of interest shall be calculated at rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average auction price for the last auction of 52 week United States Treasury bills as of the date this Decision and Order is filed with the District Director;

4. Claimant's counsel, Phil Watkins, shall have 20 days from receipt of this Order in which to file an attorney fee petition and simultaneously serve a copy of the petition on opposing counsel. Thereafter, Employer shall have 20 days for receipt of the fee petitions in which to respond to the petitions.

So ORDERED.

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RICHARD D. MILLS
Administrative Law Judge